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April 20, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: September 21, 2004

Case No.: TIA-0209

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant

appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a secretary and administrative assistant at DOE's Savannah River site (the site) for nearly 27 years. The Applicant filed an application with OWA, requesting physician panel review of three illnesses - right breast cancer, left breast cancer, and hyperthyroidism. The Applicant claimed that these illnesses were related to radiation exposure at the site.

The Physician Panel rendered a negative determination on the claimed illnesses. For each illness, the Panel determined that the Applicant's radiation exposure was insufficient to have been a significant factor in causing, contributing to, or aggravating the illness. The Panel stated that the Applicant's dosimetry monitoring data fell well below both the annual radiation dose limit for radiation workers and the average exposure level of the general public. See Panel Report at 2.

The OWA accepted the Physician Panel's determination on the claimed illnesses. The Applicant filed the instant appeal.

In her appeal, the Applicant argues that the Panel based its negative determination on the fact that she had a positive family history of breast cancer. The Applicant further argues that several doctors told her that her illnesses probably resulted from her working at the site.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related

to a toxic exposure at DOE, and state the basis for that finding.
10 C.F.R. § 852.12.

The Applicant's arguments do not provide for finding panel error. First, the Panel's reference to the Applicant's history of breast cancer does not indicate Panel error. Although the Panel discussed a positive family medical history of breast cancer as a possible risk factor for the illness, the key determination here was that the Applicant's occupational exposures were too low to have been a significant factor in her illnesses. Second, the Applicant's argument that other doctors told her that her illnesses were probably related to her employment at the site is a mere disagreement with the Panel's medical judgment, rather than an indication of Panel error.

As the foregoing indicates, the appeal does not present a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0209 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 20, 2005